No. 404

United States Supreme Court,

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York,
Appellant,

—against—

JULES W. ARNDSTEIN,
Respondent.

BRIEF FOR RESPONDENT.

Outline of Facts.

The respondent, having been adjudged an involuntary bankrupt, was called before the United States Commissioner for examination under Section 21A of the Bankruptcy Act. He refused to answer a long list of questions upon the ground that it might tend to degrade and incriminate him if he did so.

Thereafter, a motion was made to punish the respondent for contempt, because of his refusal to answer said questions. District Judge Augustus N. Hand upheld the contention of the respondent, and denied the motion to punish him for contempt.

Thereafter and subsequent to said examination and to said motion made to punish respondent for contempt, the respondent filed schedules under oath, pursuant to an order of the court.

Thereafter another motion was made to punish the respondent for contempt, which motion was again denied by the District Court, but the Judge directed him to answer certain questions, holding that by filing the schedules he had waived his constitutional privilege.

Thereafter, upon the respondent's refusal to again answer said questions, he was adjudged in contempt of court and committed to jail.

Subsequently respondent made an application for a writ of habeas corpus, which writ was refused by Hon. Martin T. Manton, Judge of the Circuit Court of Appeals, upon the ground that by filing the schedules respondent had waived his constitutional privilege, and could not thereafter refuse to reply to questions in respect to them.

Upon appeal to this Court, this order was reversed and the writ ordered to issue.

On December 20th, 1920, this Court denied a petition of the Trustee in bankruptcy for leave to intervene for certification of the entire record and for re-argument, holding:

> "Our conclusions concerning the constitutional questions presented is so plainly correct that a re-argument will be unprofitable."

Thereafter and on October 31st, 1921, upon a return which set forth all the testimony and proceedings in bankruptcy, Judge Augustus N. Hand made an order sustaining the writ and discharging the prisoner. The present appeal is by the United States Marshal from the order sustaining said writ of habeas corpus and discharging the petition.

POINT I.

The issue of waiver on the present record is exactly the same issue decided by this Court in *Arndstein* v. *McCarthy* (254 U. S. 71).

This Court in its opinion held:

> "The schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. See *Brown* v. *Walker*, 161 U. S. 591, 597; *Foster* v. *People*, 18 Mich. 266, 274; *People* v. *Forbes*, 143 N. Y. 219, 230; *Regina* v. *Garbett*, 2 C. & K. 474, 495."

There can be no difference between written and oral testimony. The fact that in one case the testimony consists of schedules filed by the bankrupt, and in the other case of oral testimony in the form of questions and answers, can make no difference. The bankrupt has the right to stop short whenever he can fairly claim that to answer might tend to incriminate him. In fact, each of the cases cited by this Court in its opinion in the case of *Arndstein* v. *McCarthy* is a case of oral testimony on the part of the person claiming the privilege.

In the case of *Regina* v. *Garbett*, 2 C. & K. 474, at p. 479; 1 Den. C. R. — C. 276, it was

settled authoritatively in England by the highest court, which decision has never been modified in any particular, that the witness has the right to claim his privilege at any stage of the inquiry. In this case the witness had testified fully and completely about a criminal transaction and refused to testify concerning his guilt in the transaction. The Court sustained his privilege, saying: "Answering in part is no waiver for a witness. He may claim the privilege at any stage of the inquiry." This decision has been followed by most of the appellate tribunals of the various states.

In *Foster* v. *The People,* 18 Michigan 266, at page 274, considered the leading American authority on this question, the Court held: "Where he has not actually admitted incriminating facts the witness may stop short at any point and determine that he will go no farther in that direction. He may judge that his protection does not require him to avoid replying concerning some facts when as to others the tendency is or seems to him more direct than incriminating."

In the case of *People ex rel. Fred S. Taylor* v. *Gerrit A. Forbes,* 143 N. Y., the question of waiver by testifying was presented and a most elaborate review of all the leading authorities made. In this case the one committed for contempt had actually testified that he had in no way participated in bringing about the death of the deceased. After this general statement, and after he had given considerable testimony concerning the affair, he asserted his constitu-

tional privilege to refuse to answer some of the details in connection with the offense. The decision proceeds: "The witness by answering the general questions as to his connection with the affair, whether his answers were true or false, did not waive his right to remain silent when it was sought to draw from him some fact or circumstance which in his judgment might form another link in the chain of facts and capable of being used under any circumstances to his detriment or peril."

Other authorities to the same effect are:

Higdon v. *Hurd*, 14 Ga. 255;
Chesapeake Club v. *The State*, 63 Md. 457;
Comm. v. *Trider*, 143 Mass. 180;
State v. *Marshal*, 36 Missouri 400;
Lombard v. *Mayberry*, 26 Nebr. 674, at p. 690.

All of these cases cited are cases where the person claiming the privilege had been called as a witness and had answered certain questions and then refused to answer other questions upon the ground that to do so might tend to incriminate him.

POINT II.

All the questions which the respondent Arndstein has refused to answer must be held to be questions wherein he would be entitled to refuse to answer on the ground that the answers might tend to incriminate him were it not for the question of waiver, because it has been so adjudicated by Judge Hand in his two decisions.

The opinion of Judge Hand upon the first motion to punish the relator is as follows:

> "The bankrupt has refused to answer questions relating to his property, asserting his constitutional privilege. I have no doubt that the answers might furnish information which would render him liable to prosecutions in the federal courts for concealment of assets to which prosecutions alone the privilege extends."
>
> *Ensign* v. *Commonwealth*, 227 U. S. 592.
>
> "However undesirable it may be that the bankrupt should be exempt from examination as to the disposition of his property, I find the overwhelming weight of authority sustains the asserted privilege. Indeed only one case of importance (*Mackel* v. *Rochester*, 102 Fed. at p. 317) seems to deny it and there the Court based its decision upon *Brown* v. *Walker*, 161 U. S. 591, where the statute gave a broder immunity than Section 7 (9) of the Bankruptcy Act. In this district various decisions upheld the privilege."
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> *In re Shera*, 114 Fed. 207;
> *In re Feldstein*, 103 Fed. 269;
> *In re Kanter*, 117 Fed. 356.

"See also *Carey* v. *Donohue*, 209 Fed. 328, at page 332, where the Court of Appeals of the Sixth Circuit sustained the bankrupt's right to refuse to answer. See also:

In re Scott, 95 Fed. 815;
In re Rosser, 96 Fed. 305;
In re Nachman, 114 Fed. 995;
U. S. v. *Goldstein*, 132 Fed. 789;
In re Walsh, 104 Fed. 518;
U. S. v. *Rhodes*, 212 Fed. 518.

"In view of the foregoing body of authority I must sustain the privilege.

The decisions of the Supreme Court in *Matter of Harriss*, 221 U. S. 274, and *Johnson* v. U. S. 228, U. S. 457, in my view distinctly involve the existence of a general privilege on the part of the bankrupt. Justice Holmes said that he could not prevent the use of his books in a criminal proceeding because they no longer belonged to him and were not produced by him but by the trustee. The opinion reads:

'A party is privileged from producing the evidence but not from its production. The transfer by bankruptcy is no different from a transfer by execution of a volume with a confession written on the fly leaf.

It is true that the transfer of the books may have been against the defendant's will but it is compelled by the law as a necessary incident to the distribution of his property not in order to obtain criminal evidence against him. Of course a man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime. If the documentary confession comes to a third

> hand *alio intuitu* as this did, the use of it in court does not compel the defendant to be a witness against himself.'
>
> "If the bankrupt had possessed no general privilege under the Fifth Amendment, why was all this refinement of reasoning necessary to sustain the use of his books before the Grand Jury in *Johnson* v. *U. S.* (*supra*).
>
> The motion to punish for contempt is denied.
>
> June 28, 1920.
>
> A. N. H.,
> D. J."

Upon the return to the writ of habeas corpus after the appeal to this Court, Judge Hand held that if the bankrupt had not waived his privilege by answering certain questions, his privilege as to the questions presented on the record should be sustained. The opinion is as follows:

> "The Supreme Court has dealt with this writ of habeas corpus and has held that it was not apparent on its face that some of the questions propounded to the petitioner would tend to incriminate him or degrade him in such a sense that he did not have the privilege of declining to answer them. They so held because they were of the opinion that the filing of his schedules in bankruptcy was not in itself and alone a waiver of his privilege. They directed that the writ which had been denied upon the petition should issue and the case should then proceed as usual. Accordingly a return has been filed to the writ setting forth not only the answers, but refusals to answer. Only the questions and the schedules in bankruptcy accompanied the petition. The

schedules, however, denied that he had any property other than a deposit of $18,000 in the Pacific Bank. If a denial and partial disclosure of some property opened the door to unlimited cross examination the schedules had that effect but the Supreme Court has held otherwise with the schedule before them.

Arndstein was asked the following questions in his examination under Section 21a of the Bankruptcy Act and gave the following answers:

> 'Q. Did you ever have any stocks or bonds in your possession or under your control, at any time during the past year? A. I never owned a share of stock. I never had a share of stock that was good, to my knowledge, in my life.
>
> Q. What do you mean by "good"? A. Well, anything that was negotiable.
>
> Q. Did you ever have any that were not negotiable? A. Yes; I bought some years ago.
>
> Q. We are talking about the past twelve months? A. No, sir.
>
> Q. Have you had any stocks or bonds in your possession or under your control at any time during the past year? A. I just answered that.
>
> Q. No; I didn't get the answer (question read). A. I answered that; I said no.'

"Now it might have been reasonably contended before the decision of the Supreme Court that the answers to these questions laid the foundation for a very general cross examination about the property of the witness, where it then was, or what had become of it. But I am unable to see how the answers differ in effect from the sworn

schedules. These the Supreme Court has held were not such a voluntary disclosure as to the financial condition of the witness as to deprive him of the right to refuse to testify further about his property and to terminate his privilege. The disclosure of the names and travels of a man accused of going under various fictitious names and transporting stolen securities might well tend to incriminate him. If by his denials and partial disclosures he has not opened the door his privilege as to these questions should be sustained. Apparently the Supreme Court has treated an examination of the bankrupt where he has been called as a witness by the other side in a different way from an examination where he has taken the stand and testified in his own behalf. In the latter case under all the decisions the broadest cross examination is proper. The ruling in the Arndstein case would seem to indicate that where the bankrupt does not testify in his own behalf he is at liberty to cease disclosures about his property, even though some have been made, whenever there is any just ground to believe the answers may tend to incriminate him. The deduction I have made as to the meaning of the decision of the Supreme Court on the Arndstein appeal is opposed to the weighty arguments made in the interesting and able brief submitted by counsel for the United States Marshal, but I can reconcile no other conclusion than the one I have reached with what has been decided by the Appellate Court, and the remedy, if any, must lie in an appeal to that Court who can distinguish the present record from the one already before it if my failure to do this is erroneous.

The writ is sustained and the petitioner is discharged.

July 7, 1921.

A. N. H.,
D. J."

POINT III.

The order sustaining the writ should be affirmed.

Respectfully submitted,

FALLON & McGEE,
Attorneys for Respondent.

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Court Press, N. Y. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THOMAS D. McCARTHY, UNITED STATES Marshal for the Southern District of New York, Appellant,
v.
JULES W. ARNDSTEIN.
} No. 404.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the Court to advance this case for hearing at an early date during the present term.

Having been adjudged an involuntary bankrupt, Petitioner (Appellee here), without objecting on the ground of self-incrimination, filed schedules under oath which purported to show his assets and liabilities. Upon examination as to these schedules under section 21 (a) of the Bankruptcy Act he refused to answer numerous questions on the ground that, as such answers might incriminate him, he was relieved from making answer by the Fifth Amendment to the Constitution. Judge Hand directed him

to answer said questions, and, upon refusal, he was adjudged in contempt and committed to jail.

He thereupon applied for a writ of habeas corpus to Circuit Judge Manton, sitting in the District Court, who denied the application; and then to Circuit Judge Hough, who also denied the application. On appeal from the order of Judge Manton denying the application this Court reversed said order. *Arndstein* v. *McCarthy*, 254 U. S. 71, 379. The District Court thereupon discharged the Petitioner upon habeas corpus, from which judgment the Marshal appeals to this Court.

On the prior appeal this Court held that the Petitioner was entitled to the writ and that the propriety of his detention could be determined after a return to the writ had been made; that as the schedules did not show that a crime had been committed the mere filing of them did not constitute a waiver of the bankrupt's constitutional right to stop short whenever he could fairly claim that to answer might tend to incriminate him. But the questions answered by the bankrupt, and the return of the Marshal to the writ of habeas corpus, which denied much of the matter contained in the original petition and set up new facts not contained therein, were not before the Court on that appeal.

The question now presented, therefore, is whether, by filing schedules and answering certain questions regarding them, the bankrupt waived his constitutional privilege as to self-incrimination, and thereby opened the door to unlimited cross-examination.

Since the decision of Judge Hand, July 7, 1921, it has been impossible to elicit testimony from bankrupts in a number of important cases. It is therefore submitted that the character of the question involved, the importance of the case to the general public, and the necessity of proper administration of the Bankruptcy laws, warrant an early hearing of this case.

This application is made on behalf of the Appellant and at the instance of counsel for the Trustee in Bankruptcy.

Notice of this motion has been served on opposing counsel.

JAMES M. BECK,
Solicitor General.

JANUARY, 1923.

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